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No. 05-1051

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In The
Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC. AND
ADECCO EMPLOYMENT SERVICES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF MOTOROLA, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should accept petitioner's invitation to define "direct evidence" in the context of employment discrimination even though this issue was not addressed by the courts below and, in any event, cannot alter the outcome of this case?

2. Whether this Court should exercise certiorari jurisdiction to determine whether the court of appeals misapplied a well-settled legal standard as to which there is no split in the circuits, particularly where the court of appeals determined that petitioner "distort[ed] and exaggerate[d] the evidence and testimony on the record"?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Motorola, Inc. ("Motorola") states that it is a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

All parties to the appeal in the Eleventh Circuit are listed in the caption of the petition.

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BRIEF OF MOTOROLA IN OPPOSITION

The petition for writ of certiorari should be denied because this case is not a good vehicle for addressing the questions presented. The first issue – the purported split among the circuits on the meaning of "direct evidence" – was not addressed by either court below and, in any event, cannot affect the outcome of this case because the purported direct evidence is not relevant. The second asks whether the Eleventh Circuit misapplied established law to the particular facts of this case and thus does not warrant the exercise of this Court's certiorari jurisdiction under Supreme Court Rule 10. Further, there is no split in the circuits on this issue to justify this Court's review.

COUNTERSTATEMENT OF THE CASE

The court of appeals, like the district court, noted that the position of petitioner Meghan Bussell ("Bussell") "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record." Pet. App. at 7a; *see id.* at 26a n.7. The same is true here. Motorola, therefore, submits the following counterstatement of the case.

The relevant events transpired during a three month period when Bussell worked for Respondent Adecco Employment Services, Inc. ("Adecco") as a temporary employee assigned to assemble police radios at Motorola's "Inpact Center." *Id.* at 13a. Bussell began working at the Inpact Center in August 2000, but she testified that she did not believe that she was sexually harassed until October 2000. *Id.* at 2a-3a. Bussell also concedes that she did not experience any further incidents of sexual harassment once she complained to Motorola's Human Resources Department

("HR") on or about December 27, 2000. *Id.* at 17a. After making her complaints known to Motorola's HR department, Bussell told Motorola that she was comfortable with returning to the Inpact Center. *Id.* at 15a-16a. Bussell resigned from her position at the Motorola Inpact Center on January 31, 2001, and immediately found other employment. *Id.* at 18a.

Bussell alleges sexual harassment based on: (1) comments made by a co-worker, Robert Render ("Render"), in October, November, and December 2000; (2) an incident in October 2000, when Render pulled on Bussell's clothing to expose a tattoo; (3) approximately 10 to 15 times in November or December 2000 when Render walked behind Bussell's desk and allegedly "rub[bed] his crotch against [her] back as he walked by, as if there was not enough room for him to get through;" and (4) a single unwelcome experience with another co-worker, Jason Wells ("Wells"), who grabbed and tickled Bussell one day in late October or early November 2000. *Id.* at 13a-14a.

Neither Render nor Wells supervised Bussell. *Id.* at 9a, 12a, 27a. They were only co-workers. *Id.* Bussell's immediate supervisors were Adecco's Tom Karge ("Karge") and Motorola's Laila Pennington ("Pennington"). *Id.* at 2a. When Bussell reported the tattoo incident to Pennington and Karge in October 2000, they promptly held a meeting for the entire department in which they reiterated to the employees (approximately 30 to 40) that neither touching nor talking "dirty" was permitted in the workplace. *Id.* at 14a. Pennington emphasized that Motorola and Adecco had "zero tolerance" for such behavior and that the employees were required to follow the companies' sexual harassment policies. *Id.* Although Bussell complained of the "rubbing" to her Adecco supervisor, she never told her Motorola supervisor about this alleged behavior. *Id.*

Bussell has admitted that she did not report the alleged sexual harassment to Motorola's HR department until late December, 2000, and then only after she herself engaged in offensive conduct. *Id.* at 5a. On December 26, 2000, Bussell began swearing at Render after he called her a "stupid girl." *Id.* Karge then took Bussell to Motorola's HR department, where she was written up for cursing. *Id.* It was at this time that Bussell first complained to Motorola's HR of sexual harassment. *Id.* Marcy Covington, Motorola's HR Administrator, immediately commenced an investigation of Bussell's sexual harassment claims. *Id.*

No witnesses corroborated Bussell's claims of inappropriate touching. *Id.* at 16a. Motorola did find that Render used foul language. *Id.* Motorola, however, concluded that – while the language was a form of harassment – it was not *sexual* harassment. *Id.* Most of Render's offensive comments were made to technicians who sat near him and were not directed specifically at Bussell. *Id.* at 2a, 8a, 13a. As punishment for his boorish conduct, Motorola gave Render a written warning, transferred him to a different department, and placed him on probation for a one-year period. *Id.* at 5a. Motorola also held mandatory sexual harassment training for all employees in the Inpact Center. *Id.* Bussell felt that she should not have had to attend the training session and that her required attendance was a form of retaliation. *Id.* at 6a.

Bussell claims that she had wanted to become a full-time employee at Motorola, but that an Adecco employee, Karge, told her that she could not because Motorola was tired of her complaining. *Id.* She admits, however, that no member of Motorola management had ever told her that her "complaining" had caused her not to become permanent. *Id.* at 6a-7a. She also admits that only a "couple" of

Adecco employees were hired as permanent Motorola employees. *Id.* The undisputed evidence showed that temporary employees were not eligible to become full-time employees until they had worked at Motorola for at least 12 months. *Id.* at 31. Bussell had worked there less than nine months when she resigned.

After resigning, Bussell sued Adecco and Motorola for sexual harassment, retaliation, and constructive discharge. The district court granted Adecco and Motorola summary judgment on all counts. In rejecting the sexual harassment claim, the district court followed precedents from this Court. *Id.* at 24a. "Although Title VII's prohibition of discrimination clearly includes sexual harassment, binding case law is quick to point out that Title VII is not a federal 'civility code.' *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) ('We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.'); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). . . ." Pet. App. at 21a. The district court concluded that Bussell's workplace sexual harassment claims failed as a matter of law because, "[a]fter sifting out Render's offensive comments that were not directed at Bussell or comments that were not of a sexual nature," all that is left is co-worker conduct that is not so severe or pervasive as to render the employer liable under the standards prescribed by this Court. *Id.* at 27a-28a.

With respect to Bussell's retaliation claim, the district court found that the actions she cited as retaliation did not rise to the level of adverse employment actions as a matter of law and that there was no evidence that Bussell had suffered from an adverse employment decision by either

Motorola or Adecco. *Id.* at 30a. "It is undisputed that Bussell never spoke with anyone at Motorola before deciding to resign. . . . Additionally, . . . Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she may have wanted or even expected to receive a permanent position at some time in the future is irrelevant." *Id.* at 30a-31a. The district court further held that Bussell's claim of constructive discharge had no merit because, by Bussell's own admission, the alleged sexual harassment had stopped before she resigned from Motorola. *Id.* at 31a.

The Eleventh Circuit affirmed in an unpublished *per curiam* opinion that is not considered binding precedent. *Id.* at 1a; *see* Eleventh Cir. Rule 36-2. On its face, the opinion of the court of appeals is fact-specific. It does not attempt to establish a new standard for judging sexual harassment claims or to distinguish between direct and circumstantial evidence. After conducting an extensive *de novo* review of the record and case law, the court of appeals could find no precedent to support the conclusion that the co-worker behavior alleged by Bussell was sufficiently severe or pervasive to constitute hostile workplace sexual harassment. Pet. App. at 9a. The court of appeals also found that the timing of Bussell's voluntary resignation – a fact issue – negated the retaliation and constructive discharge claims. *Id.* at 10a. The Eleventh Circuit, therefore, affirmed for the reasons set forth in the district court's order, which correctly articulated the controlling legal standards. *Id.* at 9a.

REASONS FOR DENYING THE PETITION

I. This Case Is Not A Good Vehicle For Addressing The First Question Presented

Petitioner's first question asks this Court to resolve what petitioner claims is a split of authority, or at least confusion, within the Eleventh Circuit and among the circuits regarding what constitutes "direct evidence" in an employment discrimination case. Petitioner's question does not warrant review, however, because the issue was not addressed below. *E.g., United States v. Williams*, 504 U.S. 36, 41 (1992); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987).

In the district court, petitioner argued that she had "direct evidence" of retaliation because, according to her, Karge, her Adecco supervisor, had told her that her Motorola supervisor had told him that petitioner would not get a permanent Motorola position because she "complained too much." Motorola's principal response was that the alleged statement was inadmissible as double hearsay. The district court never determined whether the statement was either hearsay or direct evidence. Instead, the district court found that there was no adverse employment action as necessary to support a retaliation claim because Bussell voluntarily resigned before being eligible for the permanent position. Pet. App. at 31a. Likewise, the court of appeals never discussed the direct evidence issue. It simply affirmed the summary judgment "for the reasons set forth in the district court's order." *Id.* at 9a. In any event, Bussell's voluntary resignation when she was not even eligible for permanent employment negates her retaliation claim and renders the inadmissible purported direct evidence irrelevant. *Id.* at 9a-10a, 30a-31a.

In her petition, Bussell also argues that there is direct evidence of constructive discharge and sexual harassment in the form of findings by Adecco and Motorola that Bussell was subjected to sexual harassment. *Id.* at 15. However, this purported direct evidence does not exist. Neither Adecco nor Motorola found that Bussell was subjected to sexual harassment. *Id.* at 16a. As noted by the district court and the court of appeals after its *de novo* review – although Motorola found that Render used inappropriate language – it rejected Bussell's contention that Render sexually harassed Bussell. *Id.* Moreover, there is no basis to grant Bussell's petition on this purported direct evidence issue because the court below never distinguished between direct and circumstantial evidence of sexual harassment.

II. There Is No Split In The Circuits To Justify This Court's Review of the Second Question Presented

The Court should reject Bussell's attempt to manufacture a split in the circuits on the burden of proof necessary to establish a claim for sexual harassment. Bussell's real problem is that the panel found the facts did not support a legal claim under well-established standards, not that it articulated a new legal test that creates a split in the circuits.

The court of appeals specifically applied the totality of the circumstances test articulated by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). It affirmed only after conducting an extensive review of the totality of the circumstances and concluding that the evidence of co-worker harassment was insufficient

because it was not so severe or pervasive to alter the conditions of her employment. Pet. App. at 8a. The panel cited *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582-83 (11th Cir. 2000), which, in turn, sets out the *Faragher* "totality of the circumstances" test. Pet. App. at 8a. The panel also endorsed the opinion of the district court, which correctly invoked the *Faragher* standard. Pet. App. at 9a, 21a.

In *Faragher*, this Court explained that, in determining whether an environment is sufficiently hostile or abusive to constitute actionable sexual harassment, the courts must look "'at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. City of Boca Raton*, 524 U.S. at 787-88, *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *accord Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). That is precisely what the district court and court of appeals did in this case. Pet. App. at 24a-25a.

Bussell also challenges the panel's finding that Render's crass descriptions of strip bars and the like, which were directed to his co-workers at large rather than to Bussell, did not constitute sexual harassment. *See* Pet. App. 8a. When read in context, however, this statement is merely another way of heeding this Court's frequent admonitions not to make Title VII a "general civility code." *Faragher*, 524 U.S. at 788, *citing Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). The court of appeals did not announce an absolute bar to a sexual harassment claim any time a male witness to sexual harassment finds it offensive, as Bussell claims. Rather,

the court of appeals found that there must be sexual harassment in the first place before liability can attach. Pet. App. at 8a-9a. This finding, which is consistent with the teaching of this Court, does not support Bussell's petition.

None of the cases cited by Bussell conflicts with the rule of law cited by the courts below. Bussell has not demonstrated a split among the circuits on the standard for a sexual harassment claim. All of the cases cited by Bussell turned on the application of the same *Faragher* factors that governed the opinions below. Moreover, this Court should not adopt the new rule urged by Bussell – that an employer is *per se* liable for work environment sexual harassment based on unreported touchings by a co-worker with no supervisory authority – which is without precedent. *See* Pet. App. at 9a.

In sum, the Court should deny review of the second question because it really asks this Court to determine whether the unpublished, *per curiam*, fact-intensive opinion of the court of appeals erred in the application of a correctly articulated rule of law. As explained by Supreme Court Rule 10, such is not an appropriate reason for exercising this Court's certiorari jurisdiction.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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